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IN THE

Supreme Court of the United States

October Term, 1956

No. 1000

GABRIEL T. MARTINEZ and
THERESA MARTHA MARTINEZ,
Petitioners and Appellants,
vs.
UNITED STATES OF AMERICA,
Respondent and Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals to Review a Judgment of the District Court of the United States, for the Southern District of California, Central Division.

HAROLD J. ACKERMAN,
SAM BURROW,
139 N. Broadway,
Los Angeles 12, California,
Attorneys for Appellants.

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Petition for a Writ of Certiorari to the United States Court of Appeals to Review a Judgment of the District Court of the United States, for the Southern District of California, Central Division.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States of America:

Petitioner prays that a Writ of Certiorari be directed to the United States Court of Appeals for the Ninth Circuit to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming a judgment of the District Court of the United States for the Southern District of California, Central Division.

The Petition of Gabriel T. Martinez and Theresa Martha Martinez respectfully shows:

(a)* Reference to Official and Unofficial Reports of Opinions Delivered in the Courts Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is not, to-date, reported. The opinion of the Circuit Court of Appeals, for the Ninth Circuit appears in the Appendix hereto.

(b) Statement of Grounds Upon Which Jurisdiction of this Court is Invoked.

(i) The Date of the Judgment Sought to Be Reviewed.

The judgment of the District Court of the United States was entered June 11, 1956. The Order of the United States Court of Appeals, affirming the judgment of the District Court was filed April 15, 1957.

(ii) No Petition for Rehearing was Requested by Petitioners Herein.

(iii) The Statutory Provision Conferring Jurisdiction upon this Honorable Court is found in 28 United States Codes, Section 1254, Subdivision 1.

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*The designation of letters and numbers herein follow those set forth in Rule 23 of Revised Rules of the Supreme Court of the United States.

(c) The Questions Presented for Review.

The following questions are presented for review:

I.

IS THE EVIDENCE SUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE JUDGMENT?

II.

DID THE COURT ERR AS A MATTER OF LAW IN DENYING DEFENDANTS' MOTION FOR THE SUPPRESSION OF EVIDENCE ILLEGALLY OBTAINED AND IN PERMITTING THE INTRODUCTION, OVER OBJECTION, OF EVIDENCE ALLEGEDLY OBTAINED IN VIOLATION OF DEFENDANTS' RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES OF AMERICA, IV AMENDMENT?

III.

DID THE GOVERNMENT FAIL TO PROVE THE OVERT ACTS AS ALLEGED IN THE INDICTMENT (COUNT I—CONSPIRACY) AND WAS THE PROOF OFFERED IN FATAL VARIANCE WITH THE ACTS AS ALLEGED IN THE INDICTMENT?

(d) Constitutional Provisions and Statutes Which the Case Involves.

I.

The IV Amendment to the Constitution of the United States reads as follows:

> "Section (1) the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

U. S. Codes, Title 18, Section 371:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

U. S. Codes, Title 21, Section 174:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the

same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000.00 and imprisoned not less than two or more than five years. . . . Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Amended November 2, 1951, C 666, Sections 1, 5(1), 65 Stat. 767.)"

(e) Concise Statement of the Case.

In November 1955 petitioners Gabriel T. Martinez and Theresa Martinez purchased a home paying $6,000.00 down. Theresa owned a small restaurant in downtown Los Angeles. In the fall of 1955 Jack Howe (the informer) purchased narcotics with Joel Hernandez. In February 1956, Howe and Hernandez went to an ice cream parlor near (½ block) the Martinez' residence to purchase narcotics. Howe and Hernandez made two purchases near the ice cream parlor from Gabriel T. Martinez and three from Cesario Gavaldon who apparently stayed at the Martinez' house. As on each prior occasion a preceding telephone call was made from the ice cream parlor and someone left the Martinez' house and met Hernandez.

On the fifth occasion the fifth transaction was the result of a conference between Howe and Federal agents. Galvaldon and Hernandez were arrested near

the ice cream parlor. At the time of arrest the Government agents overheard Gavaldon and Hernandez converse and concluded Gabriel T. Martinez was home. The officers went to the house, each displayed firearms, announced they were narcotic agents and demanded entry. Theresa went to the back door and upon receiving no answer to her inquiry, what the agent wanted, locked the door. The agents broke in the doors. One Louis Campos, recognized as a suspect, was shot as he left by a bedroom window. One of the agents was shot in the hand by an unknown-uncaptured suspect.

After the shooting local officers arrived. More federal agents entered and an ambulance took Campos away. The arresting agents asked Theresa about narcotics and she made certain exculpatory statements. The agents testified Theresa, cooperatively, gave permission to search each room of the house. Narcotics were found in an Alber's Oatmeal box in the kitchen cupboard and some small amount (not charged) in the garage.

Theresa Martinez was never seen on any occasion prior to the date of arrest. Gabriel T. Martinez was not seen on the date of arrest.

Prior to trial Theresa and Gabriel Martinez made a written Motion to Suppress the evidence found in the house. Other timely motions and objections were made and overruled or denied.

The Federal Grand Jury charged by Indictment the two Martinez' (petitioners), Hernandez, Gavaldon and Campos with:

Count I, conspiracy; Count II, receiving etc. heroin; Count III, sale of heroin, and County IV, concealment of heroin; a fifth count, possession of Marijuana was dismissed before trial. (g) The trial court's jurisdiction was conferred by U. S. Codes, Title 18, Section 3231.

(h) Argument in Support of Petition for Issuance of the Writ.

Petitioners respectfully submit that the evidence is insufficient to a degree that the judgment below is a miscarriage of justice.

There are two main issues which this Honorable Court is requested to review. The first is the sufficiency of the evidence. It is respectfully submitted that fundamental doctrines of criminal jurisprudence are involved. The issue involves the question of proof of a conspiracy and proof of the substantive charges of receiving, possessing, etc. narcotics. Theresa Martinez was a housekeeper, engaged in a small business and apparently worked hard at the same. Some other persons, who resided at the Martinez residence, were engaged in narcotic activity. All of the parties are tried together. Nothing is proved directly against Theresa. The circumstantial evidence against her consists of a record interest in the property, a purported attempt to keep the agent out by locking the

back door and a finding of narcotics in the kitchen cupboard. Upon this evidence the jury convicted her as a co-conspirator and of the possession of said narcotics. It is respectfully submitted that more than suspicion, conjecture and association are necessary to sustain a finding of guilt. Theresa's extrajudicial statements were exculpatory, to wit: "I might do a lot of things, but narcotics is out of the question." The best suggestion that has been made to rationalize the judgment has been, that she was guilty of participation, *sans* knowledge, because she may have furnished board and room to those that were engaged in narcotic activity.

One reads the record with a feeling of incredulity that this could sustain a conviction. Every occupant of a house where boarders choose to violate the narcotic laws and conceal narcotics in the house is guilty by the judgment herein.

Gabriel T. Martinez' conviction is equally questionable. He was only seen on two prior occasions to deliver narcotics (not charged). On the date the narcotics are found in the house he is not shown to have been home. Guilt by association is the only basis for sustaining the judgment against him.

The government relies upon the case of *Marino vs. U. S.*, 91 F. 2d 691 at 699. This case is so completely distinguishable that if anything it should have highlighted the difference between the cases and required a reversal of the judgment below.

The legal issue herein is one of the first impression in the federal criminal jurisprudence. It involves the so-called "constructive possession" doctrine. Whether or not one who is in possession of premises constructively possess all its contents has only been suggested by the case of *Eng Jung vs. U. S.*, 46 F. 2d 66 at 67. A secondary question is whether the constructive possession doctrine is sufficient to invoke the presumption of guilt as set forth in Title 21, Section 174, after a showing of (constructive) possession. Utilizing the constructive possession doctrine, raises a serious problem of due process in permitting the legislature to create presumptions of guilt.

The second issue concerns the invasion of petitioners' privacy. To uphold this invasion and permit the evidence seized without a warrant requires the law to blind itself to an armed invasion, breaking of doors, shooting of one occupant and the presence of a so-called hoard of local and federal officers. It requires the court to find a free and voluntary consent to search instead of the natural product of the pressure and fear produce thereby.

The agents believing Gabriel T. Martinez might be home went to his residence. One to the front and one to the back. Both displayed firearms. The one at the back stated: "Open up. I am a Federal Narcotics Agent. I want to talk to you." He was asked twice: "what did he want" and "what for"? Thereupon within seconds he broke in the door. The reason for their demand for entrance was not announced as required by *Accarino vs. U. S.*, 179 F. 2d 456, where it was stated:

> "Upon one topic there appears to be no dispute in the authorities. Before an officer can break open a door to a home, he must make known the cause of his demand for entry. There is no claim in the case at bar that the officers advised the suspect of the cause of their demand before they broke down the door. Upon that clear ground alone, the breaking of the door was unlawful, and so the arrest was unlawful, and the evidence thus procured should have been suppressed."

After the armed invasion one Louis Campos was shot as he fled a bedroom window. He lay bleeding and moaning (he recovered) on the front lawn. Local uniformed officers arrived as well as other federal agents. Apparently there were ten or more officers there at different times. Under these circumstances the courts have not hesitated to announce that an apparent consent is really the result of the pressure and fear produced thereby.

Theresa Martinez was not arrested until after the search revealed narcotics in the cupboard and there is no suggestion that her arrest was even contemplated before that time. The government was faced with the dilemma of requesting acceptance of Theresa's vocal consent to search, but rejection of her exculpatory statements. This predicament was passed upon in *Higgins vs. U. S.*, 209 F. 2d 819 at 820 to the effect that no sane man would consent to a search if discovery of contraband were certain to follow, at least in the absence of some extraordinary circumstance. The suggestion that there was an extraordinary circumstance

because Theresa might have thought all the narcotics had been delivered is building conjecture upon speculation.

The request for review herein is most earnestly sought because of the necessity for protecting the rights of those charged with crime against the natural pressure of the desire to stamp out the narcotics traffic.

Respectfully submitted,

HAROLD J. ACKERMAN,
SAM BUBRICK,
Counsel for Petitioners.

APPENDIX

United States Court of Appeals for the Ninth Circuit

GABRIEL T. MARTINEZ,	)	
THERESA MARTHA MARTINEZ,	)	No. 15,173
Appellants,	)	Order
vs.	)	Apr. 15,
UNITED STATES OF AMERICA,	)	1957
Appellee.	)	

On an appeal from the United States Court for the Southern District of California, Central Division.

Before: STEPHENS, FEE and BARNES, Circuit Judges.

This appeal is from a conviction under the narcotics laws. It involves questions of fact decided adversely to appellants after a trial by jury. The evidence is sufficient to sustain the judgment. We find no error affecting substantial rights.

AFFIRMED:

(Endorsed:) Order. Filed Apr. 15, 1957.

Paul P. O'Brien, Clerk.

[TITLE OF COURT AND CAUSE.]

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgments of the said District Court in this cause be, and each of them hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered: April 15, 1957

PAUL P. O'BRIEN, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1000

GABRIEL T. MARTINEZ AND THERESA MARTHA MARTINEZ,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 2) was entered on April 15, 1957. The petition for a writ of certiorari was filed on May 14, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the jury verdict.

2. Whether there was a valid search incident to a valid arrest.

STATEMENT

An indictment was returned against petitioners and others in the District Court for the Southern District of California, charging violations of the narcotics laws and conspiracy. Count one charged all the defendants with conspiracy to receive, conceal, transport and sell narcotics. Petitioner Gabriel Martinez, and others, were charged in count three with the substantive offense of selling, and in count two with that of receiving, concealing and transporting, 204 grains of illegally imported heroin. Count four charged both petitioners with the substantive act of receiving and concealing 32 grains of illegally imported heroin. (R. 3–6.) Defendant Hernandez pleaded guilty to counts two and three (R. 30). The jury found all the defendants guilty as charged (R. 41–43).

Gabriel Martinez received concurrent sentences of five years imprisonment on counts one and two and fines of $10,000 and $2,000 respectively and a consecutive five year sentence and $2,000 fine on count three. On count four, he was given a suspended sentence with a five year probationary period to follow his release from custody. (R. 44–45.) Theresa Martinez received five year concurrent sentences of imprisonment on counts one and four, and fines of $10,000 and $2,000 respectively (R. 47).

On appeal, the judgments were affirmed (Pet. App. 2).

The evidence adduced by the government may be summarized as follows:

Jack Howe, a sporadic user of heroin, testified that he frequently purchased narcotics in the vicinity of Temple and Alvarado Streets, Los Angeles, during the months of October through December of 1955 (R. 95–97). It was here that he first met the defendant Hernandez (R. 70–71, 94) and was able to make a purchase of heroin from him (R. 97). Petitioner Gabriel T. Martinez was pointed out to Howe at this location and Howe saw him several times in this vicinity thereafter (R. 70, 93–94). Gabriel Martinez was known to Howe and others as "Velli" (R. 77).

In November 1955, petitioners, who are husband and wife, jointly purchased a house at 3040 Atwater Street, Los Angeles, paying $6,000.00 cash as the down payment (R. 59–62). Possession of these premises was given to the petitioners in December, 1955, or January, 1956 (R. 60).

In January, 1956, Howe's place of securing narcotics shifted to the immediate vicinity of the 3040 Atwater Street premises (R. 97). On five separate occasions from January to February 27, 1956, at intervals between four or five days and a week, Howe made purchases of heroin in this area (R. 72–79, 108–115; R. 80–83, 116–122; R. 83–86; R. 87–88; 126–137, R. 89–92). In each instance, Howe first contacted defendant Hernandez at Hernandez' home (R. 73, 80, 84, 87, 89). Then, sometimes in company with others, Howe and Hernandez would drive to a point near an ice cream stand near the Atwater home of the petitioners (R. 75–76, 80, 84, 87). In each instance defendant Hernandez made a telephone call

from a booth nearby (R. 76, 80, 84, 87, 90), and minutes later a person would leave the house at 3040 Atwater Street, join Howe and Hernandez, and deliver a quantity of heroin (R. 76–79, 81–83, 84–86).

On three of the five occasions, it was petitioner Gabriel T. Martinez who came out of the 3040 Atwater Street premises to deliver the heroin (R. 76–77, 84–85, 88). On the other occasions it was another defendant, Gavaldon (R. 81, 90–91).

On one occasion, petitioner Gabriel T. Martinez, who left the house and delivered the narcotics, was accompanied part way by the defendant Campos. Campos and Martinez left the house together and Campos was seen to look up the street several times. (R. 88.) Martinez told Hernandez that he could supply as much "junk" as was wanted and at any time (R. 88). There had been other conversations between Howe and Hernandez in which Hernandez stated he could get any amounts of heroin Howe wanted at "Velli's" (R. 91).

Prior to the fifth such transaction, Howe made a full disclosure to agents Jones and Gullon of the Bureau of Narcotics (R. 89). Howe then entered into the fifth transaction while being observed by the agents (R. 89–92).

On February 27, 1956, the narcotics agents supplied Howe with $140 in bills, the serial numbers of which were recorded (R. 129). Thereafter, Howe met Hernandez at the latter's home (R. 130, 172) and they proceeded to the ice cream stand near the Atwater address of petitioners. They arrived there at approximately 2 P. M., after the agents had located themselves in that area (R. 131–135).

Hernandez bought some ice cream, made a phone call from a nearby booth (R. 174), and then proceeded down Atwater street (R. 134). Gavaldon left the premises at 3040 Atwater, crossed the street and met him (R. 135, 175). Currency was exchanged (on a subsequent search Hernandez was found with $20.00 and Gavaldon with $120.00 of the original $140.00 given to Howe by the officers (R. 167, 185)). As one agent approached, Gavaldon threw down a package which was retrieved by another agent (R. 136, 175). This package contained the heroin petitioner Gabriel Martinez is charged with concealing and selling in counts two and three.

Gavaldon and Hernandez were arrested (R. 136, 175). They spoke to each other in Spanish (R. 136–137), a language understood by agent Gullon (R. 177). Hernandez asked what happened to the package and Gavaldon said he threw it away. Hernandez asked whether Velli (petitioner Gabriel Martinez) would take care of the situation and Gavaldon stated there was nothing to worry about, that Velli was waiting for the money at the house, and that, if he did not show up, Velli knew what to do and would take care of everything. (R. 177–178.)

A field test was made immediately on the contents of the package which Gavaldon had thrown down and it was found by the officers to be a derivative of opium (R. 150–151, 176). The officers determined to make an immediate arrest of petitioner Gabriel T. Martinez whom they believed to be in the premises at 3040 Atwater Street (R. 154, 178).

Jones went to the front door and Gullon to the back door; each identified himself as a federal narcotics agent and demand admittance (R. 138, 179). At the same time both officers heard noises of moving furniture, shuffling and running feet, coming from inside the house (R. 139, 180). Jones immediately began to break in and was the first to enter (R. 199). Gullon, while in the course of identifying himself and demanding admittance, observed the petitioner Theresa Martha Martinez locking the door which was between them. He immediately forced an entrance. (R. 179–180, 198.)

Jones, after entering, found himself in the living room, with bedrooms to his left, and the kitchen toward the rear of the house (R. 140). As he moved toward the second bedroom, Campos, whom he recognized from a description furnished by Howe, ran out of the bedroom "full tilt" into him (R. 140–141). Campos then turned and ran back into this bedroom. Jones shouted that he was a federal narcotics agent, that Campos was under arrest, and followed into the bedroom. (R. 141.) A second man was climbing out of the bedroom window and Campos started to follow. Jones fired a warning shot low and to the left of the window, while ordering the men to halt. He then took hold of Campos by the legs but Campos kicked free and went on outside. (R. 141–142.) When Jones looked out the window he was fired on by the other man, one of the shots striking Jones in the hand (R. 142–143). Jones fired another shot over the head of Campos, as he fled towards the street between the adjacent houses, and Jones continued to call upon

Campos to halt. A third shot hit Campos in the buttocks as he reached the front of the house and he fell on the front lawn. (R. 143.) Jones left the house by the window and gave chase after the other man, but was unable to catch him (R. 144).

In the meantime, Gullon, who had entered by the rear door, made a quick search of the premises for petitioner Gabriel T. Martinez, but found no one in the house except petitioner Theresa Martinez (R. 180, 199, 290). He then went to the front yard, placed Campos under arrest, returned to the house and telephoned for an ambulance and for additional officers (R. 180–181).

Uniformed officers of the local police arrived first, and an ambulance and four other federal agents arrived about the time agent Jones returned from his chase (R. 144, 147, 157–159, 200–201). These agents and some plainclothes officers came into the house, but no search was commenced until agent Gullon asked petitioner Theresa Martha Martinez for permission to look for narcotics (R. 157, 164, 188). Permission to commence the search was given by her, upon first being requested, which occurrence was about thirty minutes after the breaking in by the officers (R. 145–146, 156, 181–183). Additional permission was requested and received as the officers moved from room to room (R. 147–148). The requests and replies were made in both English and Spanish (R. 183). Petitioner Theresa Martha Martinez' attitude was described as cooperative (R. 183). She replied on one occasion that she had no objection because any narcotics found would belong to Velli (R. 145). No

force was used in the course of the search (R. 147–148).

Prior to the search of the kitchen, petitioner Theresa Martinez was asked by Gullon about her use of the kitchen. She replied that she used the stove and all of the utensils and, in effect, stated that she did the cooking. (R. 184.) In another conversation during the search petitioner Theresa Martinez stated that on one occasion she had seen Velli, Gavaldon and Campos fooling with a powdery substance on the kitchen table (R. 149). At another time when shown a package of capsules which had been found in an oatmeal box, petitioner Theresa Martinez replied that it belonged to Velli and she stated she had warned Velli "that if he didn't get rid of these friends of his, they were all going to get into trouble" (R. 148–149).

There were boxes of empty gelatin capsules, similar to the filled ones found in the package thrown down by Gavaldon, open to view in the kitchen. On one occasion petitioner Theresa Martinez attempted to hide such a box and knocked it to the floor, spilling the contents. (R. 149, 195–196.)

The search of the premises yielded: a package of capsules filled with heroin, found in an Albers oatmeal box which was in the kitchen cupboard and constitutes the concealed heroin named in count four (R. 209); two tins of powdered milk sugar found in the same cupboard (R. 210); a large quantity of balloons and finger stalls found in a utensil drawer in the kitchen (R. 211); three boxes of gelatin capsules found in a waste basket on the back screened porch

(R. 210–211); balloons with their tops cut off found in the back yard (R. 213); and a small paper "bindle" of loose heroin found in the garage (R. 214). Each of the packages of capsules full of heroin was made up of capsules wrapped tightly in a balloon with its top cut off short just above the contents, or in a finger stall (R. 111, 113, 150, 152–153). In some, the smaller packages were contained in a larger package, also made from a balloon or finger stall (R. 150).

Chemical analysis showed that the package recovered in the street (Ex. 3, R. 168), the package found in the kitchen (Ex. 4, R. 185–186), and the bindle from the garage (Ex. 11, R. 214) all contained heroin (R. 219–220). It also showed that the packages found in the kitchen and in the street were from a common source (R. 221). The milk sugar contained in the tins found in the kitchen was of the same kind as the lactose or milk sugar mixed with the heroin (R. 221–222).

A motion to suppress the evidence unearthed during the search was denied (R. 33–34).[1]

[1] Petitioners Gabriel and Theresa Martinez were known to drive a 1956 Lincoln Premier and a 1956 Oldsmobile 98 (R. 159–161, 189), the first being owned by Theresa (R. 286), and the second being in the name of Gabriel (R. 164, 190, 284). Petitioner Gabriel admitted at one time owning and paying "almost six thousand dollars" for the Lincoln (R. 162, 189). He also stated to the officers that he had several bank accounts, in one of which the deposit was $6,000.00 (R. 163, 190), and that he was not working at this time but when he worked it was as a student barber. He stated he had won money gambling in the army. (R. 163.)

Petitioner Theresa Martinez was shown to be the proprietress of a restaurant with a capacity of twelve customers (R. 267, 275).

ARGUMENT

1. Petitioners allege that the evidence against them was insufficient to support their convictions (Pet. 7–9). We believe that it is evident from the review of the facts included in the Statement above that there was sufficient evidence to justify the jury's verdict. There is no necessity for this Court to review the findings of the court below so holding.

2. Although the District Court did not state the ground for the denial of petitioners' motion to suppress the evidence seized during the search of their home (R. 33–34), the government sought to sustain it first on the ground that the search and seizure were incident to a lawful arrest and, secondly, on the ground that the search was made upon consent (R. 13).

It is unnecessary to reach the question of the voluntariness of the consent, since the search was valid as incident to a valid arrest. Before the agents attempted to enter petitioners' home, they had ample grounds to believe that a felony was then and there being committed. There was no time to obtain a warrant either for arrest or search since the conversation between the two defendants just arrested revealed that petitioner Gabriel Martinez would become suspicious as soon as Gavaldon failed to return with the money (R. 177–178, see the Statement, *supra*, p. 5). Immediate action was required to prevent the escape of a leading conspirator and the concealment of the contraband.

In the absence of an applicable federal statute, the validity of this arrest must be determined by the law of the State of California. *Johnson* v. *United States*,

333 U. S. 10, 15, fn. 5; *United States* v. *Di Re,* 332 U. S. 581, 589; *Rent* v. *United States,* 209 F. 2d 893, 897 (C. A. 5). Under Section 836[2] of the Penal Code of California, arrests without a warrant may be made, *inter alia,* when a felony has been committed and there is reasonable cause for believing the person arrested committed it. Under Section 844 of said Penal Code,[3] an entry may be forced if there are reasonable grounds for believing the person to be arrested is within, and there has been a demand for admittance and an explanation of the purpose for which admittance is desired. The California courts have held that the compliance with the proviso as to demand for admittance and explanation of purpose is not required if the officer's peril would be increased, or the arrest frustrated, or evidence destroyed or

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[2] Section 836 of the Penal Code of California provides:

"ARRESTS BY PEACE-OFFICERS

"A peace-officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

* * * * *

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

* * * * *"

[3] Section 844 of the Penal Code of California provides:

"To make an arrest, a private person, if the offense be a felony, and in all cases a peace-officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

secreted, if he had demanded entrance and stated his purpose. *People* v. *Maddox*, 46 Cal. 2d 301, 294 P. 2d 6, 9, certiorari denied, 352 U. S. 858; *People* v. *King*, 140 Cal. App. 2d 1, 294 P. 2d 972; *People* v. *Sayles*, 140 Cal. App. 2d 657, 295 P. 2d 579, 582.

Here, the agents demanded entrance and announced themselves to be federal narcotics agents. The purpose for this demand was self-evident. Instead of compliance with their request, petitioner Theresa Martinez locked the door, and noises indicating persons escaping were heard. Under such necessitous circumstances, the forced entry was permissible under applicable California law (*supra*, p. 11). See also *Mattus* v. *United States*, 11 F. 2d 503, 504 (C. A. 9), in which it was held that officers who had rung a bell, knocked on a window, and demanded admittance, as federal narcotics agents, to a house in which an informer had just purchased morphine were justified, on receiving no response, in forcing an entrance without a warrant to make an arrest.

Aside from the fact that the validity of the arrest in the instant case is governed by California law, so that the decisions of the District of Columbia Circuit are not directly in point, the decision below does not conflict with *Accarino* v. *United States*, 179 F. 2d 456 (C. A. D. C.), on which petitioners rely. In that case the court held that under the particular facts the officers were not justified in breaking down a door in order to make an arrest, because there had been ample time to get a warrant, the officers had deliberately waited until the defendant reached his home before attempting to arrest him and did not explicitly an-

nounce their purpose. Here, as noted, there was an emergent situation and the officers did announce their authority under circumstances making the reason for their demand evident. The situation here is more closely analogous to the arrest and search upheld by the District of Columbia Circuit in *Shepherd* v. *United States*, petition for a writ of certiorari granted *sub nom. Miller* v. *United States*, No. 998, this Term. We assume that the grant of certiorari in the *Miller* case was based upon an interpretation of District of Columbia law or on doubt as to the urgent necessity for immediate action, factors which are not present here.

The subsequent arrest of co-defendant Campos was valid since he was recognized as being a suspected member of the narcotics ring thought to be operating out of petitioners' home, and was obviously attempting to escape. This knowledge was sufficient to constitute probable cause for arrest in the mind of a reasonable man, under the criterion set forth in *Brinegar* v. *United States*, 338 U. S. 160, 175–176.*

The search, made as soon as possible after the arrest (*supra*, pp. 6–7), was for narcotics, and the area searched was reasonable in relation to the crime observed. It was not known where on the premises the source of supply for the narcotics ring was kept, only

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*It is not necessary that the owner of the house searched be the party arrested. If he lends his home for an illegal use, evidence obtained on a search after arrest of the felon who so used it is admissible against the owner. *Clifton* v. *United States*, 224 F. 2d 329, 330–331 (C. A. 4), certiorari denied, 350 U. S. 894.

that the sale of narcotics always was made by someone leaving petitioners' home and in its immediate vicinity and that petitioner Gabriel Martinez had said he could supply any amount, at any time. The search of the house, the yard, and garage, under the particular facts of this case, was justified. See *United States* v. *Rabinowitz*, 339 U. S. 56, 63.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ISABELLE CAPPELLO,
Attorneys.

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